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Supreme Court, U.S.
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No. 02-1168

IN THE

Supreme Court of the United States

AMERICAN GENERAL LIFE INSURANCE COMPANY,
Petitioner,

v.

SPHERE DRAKE INSURANCE LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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March 7, 2003

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& f/o

QUESTION PRESENTED

Whether, pursuant to the "evident partiality" standard of § 10(a)(2) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(2), an arbitration award must be vacated merely because a party-appointed arbitrator failed to make a full disclosure of his prior relationship to the parties, even though the undisclosed facts themselves would not demonstrate the arbitrator's "evident partiality."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Sphere Drake Insurance Limited states the following:

Sphere Drake Insurance Limited is a wholly owned subsidiary of Fairfax Financial Holdings Limited, a Canadian corporation that is publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Fairfax Financial Holdings Limited has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case involves a dispute between two insurance companies over alleged contracts to provide reinsurance. Pursuant to a post-contract agreement, the dispute was submitted to a panel of three arbitrators, consisting of two arbitrators appointed by the parties and a neutral umpire. A majority of the arbitrators determined that no contracts had been formed between the parties because petitioner had disavowed its putative agent, which had entered into the alleged agreements with respondent's agent. Absent an agency relationship, petitioner's putative agent had no power to bind petitioner, and thus no contract between petitioner and respondent could be established.

As the case proceeded to the courts to enforce the arbitration decision, the issue became whether the party arbitrator selected by respondent Sphere Drake failed to disclose information about his prior relationship with Sphere Drake and thereby demonstrated evident partiality. In holding that the incomplete disclosure did not demonstrate evident partiality, the court of appeals applied well-settled legal principles to the facts and concluded that the arbitration was not tainted by bias. Petitioner cannot cite a single case to support its extraordinary contention that this Court should engraft onto the plain language of § 10(a)(2) of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2), a requirement that a court must vacate an arbitration award if a party-appointed arbitrator makes an incomplete disclosure of his prior relationship to the parties even when the undisclosed information does not rise to the statutory standard of "evident partiality." Further review therefore is unwarranted.

STATEMENT

1. In a normal set of transactions between an arms-length reinsurer and reinsured, the reinsurer will set the premium at a level at which it can still make a profit after

covering the expected losses.[1] That normal financial model for reinsurance, however, was turned on its head by the agents for All American and Sphere Drake in the situation at issue. Instead of charging its reinsureds a sufficient premium to cover its anticipated losses and still post a small profit – as would be the case in the normal reinsurance arrangement – All American charged an inadequate premium for the risks it assumed. All American then sought to pass the majority of expected losses to Sphere Drake through reinsurance from Sphere Drake that was allegedly obtained by All American's putative agent from Sphere Drake's agent. The alleged contracts between All American and Sphere Drake had the certain consequence (because of the nature of the coverage and expected losses at issue) of requiring Sphere Drake to pay out losses far in excess of the premium that it received, in effect ensuring a profit to All American while guaranteeing a loss to Sphere Drake and a depletion of Sphere Drake's capital. Sphere Drake alleged that this conspiracy to defraud it was hatched by All American's putative agent Stirling Cooke Brown Reinsurance Brokers Limited ("Stirling Cooke") and involved a Ponzi-like scheme that generated brokerage commissions to Stirling Cooke at each turn of the scheme from reinsurer to reinsurer. *See* C.A. App. 201-27.[2] The more money taken out in profit and brokerage fees, the less was available to cover losses for the reinsurers down the line. Like other Ponzi schemes, at some point that house of financial cards would collapse of its own weight.

The process of creating this fraudulent series of alleged contracts was the subject of a complicated and protracted investigation, resulting in a year-long trial for fraud in the United Kingdom that ended in December 2002 and

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[1] The frequency and severity of workers compensation losses, which was the business reinsured here, can be predicted with relative confidence based on statistical data for prior years.

[2] "C.A. App." refers to the appendix to the brief filed by Sphere Drake in the Seventh Circuit.

awaits a decision. Sphere Drake brought the U.K. action against All American's agent in placing the reinsurance at issue, Stirling Cooke, and Sphere Drake's agent for accepting the reinsurance, European International Underwriters Ltd. ("EIU"). Stirling Cooke, acting for All American and other ceding companies, had placed a total of 112 contracts with EIU during the 18-month period that EIU was in operation. Like most of the other contracts that Stirling Cooke brokered to EIU, an important feature of the contracts at issue here is that they were consummated not by officers or employees of All American and Sphere Drake, but rather by companies purporting to act as the agents for All American and Sphere Drake.

Following an investigation of EIU's activities, Sphere Drake informed All American that Sphere Drake was not bound by those purported reinsurance contracts because Stirling Cooke had fraudulently colluded with EIU and induced EIU to breach the fiduciary duties EIU owed to Sphere Drake. On June 11, 1999, All American rejected Sphere Drake's assertion of fraud and made a demand for arbitration based on the seven purported reinsurance contracts between the parties, in the process also designating its party-appointed arbitrator, Robert Mangino. On July 12, 1999, Sphere Drake responded with respect to six of the supposed contracts, conditionally appointing Ronald A. Jacks as its party-appointed arbitrator and also questioning whether the "slips" that evidenced the alleged contracts committed the parties to arbitrate their disputes.[3] The parties subsequently agreed to submit the dispute raised with respect to six of the seven contracts to an arbitration panel consisting of the two party-appointed arbitrators who had already been named and a third arbitrator nominated by both parties to serve as umpire.[4]

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[3] A slip is an abbreviated version of a full reinsurance contract and contains the essential terms of the agreement. An example of the slips at issue is reproduced at App., *infra*, 1a-5a.

[4] The seventh alleged contract is the subject of litigation in the United States District Court for the Northern District of Illinois,

The parties then jointly appointed Robert Huggins as umpire.

Prior to the organizational meeting of the arbitration, which was set for April 11, 2001, the parties submitted position statements detailing their respective claims and defenses. By agreement, Sphere Drake submitted its statement first, in which it argued that the six purported contracts were void *ab initio* because All American's putative agent, Stirling Cooke, knew that Sphere Drake's agent, EIU, lacked the authority to accept (on behalf of Sphere Drake) the business that Stirling Cooke brokered. Sphere Drake also argued that Stirling Cooke had colluded with EIU to defraud Sphere Drake. In its response, All American denied that Stirling Cooke was All American's agent: "There was no agency relationship between Stirling Cooke and All American or between Stirling Cooke and WEB[5]; Stirling Cooke had no authority to bind either All American or WEB and neither All American nor WEB entered into any form of agency agreement with Stirling Cooke." Pet. App. 17a-18a (internal quotation marks omitted).

At the organizational meeting, both the arbitrators and the umpire disclosed their prior relationships with each other, the parties, and the parties' counsel. Arbitrator Jacks stated that he was aware of All American's existence, but that this was his first contact with the company. *See id.* at 18a. Jacks further reported that he had "known of Sphere Drake over the years and of Sphere

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Sphere Drake Ins. Ltd. v. All American Life Ins. Co., Case No. 99 C 4573 (Judge William T. Hart), and is not part of the litigation before this Court. That case is on remand from the Seventh Circuit's decision reported at 256 F.3d 587 (2001).

[5] WEB Management LLP was All American's managing general agent pursuant to a written contract with All American, which granted WEB authority to accept and cede reinsurance on All American's behalf. See C.A. App. 48. WEB was also affiliated with Stirling Cooke. *See id.* at 204.

Drake's parent Odyssey," and that he was the party arbitrator for Sphere Drake on two pending arbitrations. *Id.* (internal quotation marks omitted). Umpire Huggins disclosed that he was a shareholder in American International Group, Inc., which had recently made a bid to acquire All American's parent company. *Id.* Huggins further related that, in early 1996, Sphere Drake's parent corporation, Fairfax Financial Holdings Limited, had retained him to head a due diligence team and that he also had been involved as an arbitrator for one of Sphere Drake's affiliates. *Id.* Neither party objected to those disclosures, and the parties certified the panel to decide the dispute.

At the organizational meeting, the parties further agreed to allow *ex parte* contacts between the parties and their respective arbitrators through the end of discovery in the arbitration. The panel also unanimously granted Sphere Drake's request to submit a case-dispositive motion. Sphere Drake explained to the panel that All American had admitted in its response to Sphere Drake's position statement that Stirling Cooke was not its agent and had no authority to bind All American. Sphere Drake further explained that the only evidence of contracts between the parties was the offers, in the form of reinsurance "slips," extended to EIU by Stirling Cooke, purportedly acting for All American. The "slips" were then accepted by EIU, acting for Sphere Drake. If Stirling Cooke was not All American's agent, and therefore had no authority to bind it, no contract existed between All American and Sphere Drake as a matter of elementary contract law.

On May 7, 2001, after reviewing the transcript of the April organizational meeting, Arbitrator Jacks announced that he realized he had neglected to disclose a prior relationship with a company related to Sphere Drake. He explained to the parties, in writing, that he had "provided limited corporate advice to Jonathan Crawley, then President of Sphere Drake's Bermuda subsidiary. In that

capacity I recommended that my former law firm, Mayer, Brown, & Platt, be retained to represent Sphere Drake (Bermuda) Ltd. in an arbitration . . . involving a set of wholly unrelated issues which were settled shortly after the initial meeting of the Panel and Counsel." Pet. App. 19a (ellipsis in original). All American asked no questions about this information and did not object to the revised disclosure. *See id.* at 20a.

After Jacks made the revised disclosure, Sphere Drake filed its case-dispositive motion and supporting brief for a final award based on All American's admission in its position statement. Sphere Drake explained that the panel should treat All American's position statement as a pleading and its representation that Stirling Cooke had no authority to bind All American as a judicial admission. Sphere Drake contended that a party should be held to its representations to an arbitration panel in the same way that a party is held to its representations in court; without such a binding rule, parties could readily subvert the dispute resolution process. Moreover, Sphere Drake explained, in prior litigation between the parties with respect to the very same purported contracts, the United States District Court for the Northern District of Illinois had ruled that the position statements in an arbitration were the equivalent of pleadings. *See* C.A. App. 109. On the merits, Sphere Drake set forth All American's unequivocal statement that Stirling Cooke was not its agent and lacked authority to bind All American. *See id.* at 107-09. Because the only evidence of the existence of the supposed contracts was the slips that had been presented by Stirling Cooke to EIU for acceptance, All American's admission of Stirling Cooke's lack of authority was dispositive of the case. *See id.* at 112-14. Without authority from All American, Stirling Cooke could not make a valid offer to EIU when it presented the slips representing the offer to contract and thus could not form a valid contract.

On July 5, 2001, Umpire Huggins and Arbitrator Jacks issued a final award (over the dissent of Arbitrator Man-

gino) granting Sphere Drake's motion for judgment on the pleadings and dismissing the arbitration on the merits with prejudice. *See* Pet. App. 20a. The panel majority held that All American's position statement was dispositive of the case:

> All American's [position statement] . . . is a "Pleading," as defined by the relevant authorities . . . [and] as such, All American's statement . . . is a "Judicial Admission" as that term is defined by the relevant authorities, and thus is binding on All American as a matter of law and public policy. Therefore, since All American has formally and unequivocally admitted in its pleadings that: (1) there "was no agency relationship between Stirling Cooke and All American and WEB"; (2) "Stirling Cooke had no authority to bind either All American or WEB"; and (3) "neither All American nor WEB entered into *any* form of agency agreement with Stirling Cooke" (emphasis added), Stirling Cooke . . . was not legally competent to contract with Sphere Drake or . . . EIU, and there is no need for an evidentiary hearing on this issue.

Id. (brackets and ellipses in original). Arbitrator Mangino dissented, expressing the view that the wording in All American's position statement was ambiguous as to the agency relationship and that the panel should have conducted fact finding. *Id.* at 21a.

2. Sphere Drake moved in the district court to confirm the arbitration award, while All American filed a cross-motion to vacate the award on the grounds that Jacks was partial, the hearing was unfair, the arbitrators exceeded their authority, and the award was issued in manifest disregard of the law. *See* Pet. App. 12a-13a. All American sought and obtained discovery on Arbitrator Jacks' involvement with Sphere Drake during the period in which he had been a partner at Mayer, Brown & Platt. The district court granted All American's cross-motion to vacate the award. The court concluded that All American's post-arbitration discovery had revealed that: Sphere Drake

itself (rather than its Bermuda subsidiary) had been a party to the arbitration in which Mayer, Brown acted as counsel; Jacks himself had billed 379.35 hours over four years on that matter (thereby generating $132,737.50 in legal fees); and Mayer, Brown had billed total fees of $278,771.25 on the matter. *Id.* at 22a-23a. Jacks was also listed on the law firm's records as the billing and responsible attorney and had provided other legal service to Sphere Drake's Bermuda subsidiary in several matters, one totaling 13 hours of work and two others totaling 51.5 hours of work. *Id.* at 23a. Based on that evidence, the district court concluded that Jacks' failure to disclose this information demonstrated the requisite partiality to warrant overturning the arbitration award because the disclosure was inadequate and not completely forthcoming.

3. Sphere Drake appealed the decision, arguing that the district court had applied an incorrect standard to determine evident partiality and ignored important facts. First, the district court had not taken into account that Jacks had retired from Mayer, Brown on December 31, 1997, four years before his disclosure in the arbitration. Second, the district court had not considered that it was Sphere Drake's Bermuda subsidiary, and not Sphere Drake, that had retained, directed, and paid Mayer, Brown. The district court had also ignored the evidence that Sphere Drake's Bermuda subsidiary had underwritten the contract (and issued the contract in the name of Sphere Drake) in the dispute disclosed by Jacks and had directed the defense of the dispute; further, the Bermuda subsidiary was the only client listed on Mayer, Brown's records, and both Sphere Drake and its Bermuda subsidiary had been sold and their management changed at about the same time that Jacks had retired from Mayer, Brown – four years prior to the incomplete disclosure.

The Seventh Circuit reversed. Pet. App. 1a-11a. In an opinion by Judge Easterbrook, the court of appeals explained that Jacks had served more than 25 times as an "umpire" in arbitrations, having been selected "by party-

named arbitrators who relied on his reputation for legal acumen and impartiality." *Id.* at 2a-3a. The court also noted that "Huggins decided that Sphere Drake was entitled to victory on the ground that All American had disavowed Stirling Cooke Brown Reinsurance Brokers as its agent (a tactic apparently designed to avoid any risk that Stirling Cooke, which placed the reinsurance through EIU, would be found to know about EIU's limited authority)." *Id.* at 3a. The court then observed that All American challenged the arbitration because "it did not like the result" of the very arbitration process that it had "demanded." *Id.*

The court noted the unprecedented nature of the district court's ruling to overturn the arbitration award – "the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed 'evident partiality.'" *Id.* The court explained that party-appointed arbitrators are "*supposed* to be advocates" for the parties who appoint them, "[y]et no one believes that the predictable loyalty of these designees spoils the award." *Id.*

The court then analyzed the particular facts of Jacks' involvement with Sphere Drake. The court explained that "Jacks could have served as a federal judge in this case without challenge on grounds of partiality, and the scope of disqualification under § 10(a)(2) is considerably more confined than the rule applicable to judges." *Id.* at 6a (citing cases). The court then noted that "evident partiality," the standard under § 10(a)(2), is a "subset of the conditions that disqualify a federal judge under 28 U.S.C. § 455(b)." *Id.* The court observed that a federal judge may not own a single share of a party's stock – to do so would create "evident partiality" – but the parties themselves had agreed that such a standard would not be applied to the arbitration panel because Umpire Huggins himself had "revealed that he was an investor in American International Group, which recently had made a bid

to acquire All American – yet neither side thought that this imperiled Huggins' ability to serve as the neutral." *Id.*

As for Jacks' prior representation of Sphere Drake, the court described the disqualification standard for a federal judge sitting on a case in which he had represented a party. *Id.* at 6a-7a. Invoking the judicial codes of conduct, the court concluded that prior representation of a litigant in this circumstance was not "a disqualifying event." *Id.* at 7a. Based on the facts presented, the court reasoned that, "[i]f Jacks could have served as a federal judge in this case, it is impossible to see how his background could demonstrate 'evident partiality' within the meaning of § 10(a)(2)." *Id.* (citing cases).

The court specifically took issue with All American's characterization of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), noting that it "did not hold, as All American would have it, that disclosure is compulsory for its own sake, and its absence fatal even if the arbitrator meets judicial standards of impartiality." Pet. App. 10a. The court stressed that *Commonwealth Coatings* simply did not address the issue presented here: whether "party-appointed arbitrators are governed by the norms under which neutrals operate." *Id.* Rather, "[t]he point of *Commonwealth Coatings* is that the sort of financial entanglements that would disqualify a judge will cause problems for a neutral under § 10(a)(2) unless disclosure is made and the parties' consent obtained." *Id.* Accordingly, the court reversed the district court's judgment vacating the arbitration award.

The court of appeals denied All American's petition for rehearing en banc without dissent. *Id.* at 39a-40a. The case has now returned to the district court for proceedings on All American's other three challenges to the arbitration award. Under a stipulated schedule, All American has already filed its renewed motion to vacate the award, and briefing is scheduled to be completed by March 28, 2003. *See* App., *infra*, 6a.

REASONS FOR DENYING THE PETITION

I. The decision below is consistent with the plain language of FAA § 10(a)(2)'s "evident partiality" standard and this Court's decision in *Commonwealth Coatings*, and it does not conflict with a decision of any other court. The holding requested by petitioner – that incomplete disclosure *alone* requires a court to vacate an arbitration award, even where the facts, if revealed, would not demonstrate an arbitrator's "evident partiality" – finds no support in the text of FAA § 10(a)(2) or in any judicial decision construing it.

II. Even if petitioner had presented an issue warranting this Court's plenary review, this case would be a poor vehicle for deciding it. The issue presented arises in a highly unusual factual posture not likely to recur and from an arbitration that proceeded not pursuant to an explicit agreement or arbitration organization's procedures, but rather through *ad hoc* decisions made between the parties. Moreover, petitioner asks this Court to grant review of a case from an interlocutory decision, which is contrary to the Court's longstanding policy against piecemeal appeals. Petitioner itself predicts that the proceedings on remand from the decision below will generate further appeals. Petitioner thus does not present an issue of general importance warranting this Court's review.

I. THE DECISION BELOW IS CORRECT AND CREATES NO CONFLICT WITH THE DECISIONS OF THIS OR ANY OTHER COURT

FAA § 10(a)(2) provides that the district court "may make an order vacating" an arbitration award "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). All American seeks vacatur of the arbitration award in this case even though it concedes that "the facts to be disclosed would not result in the arbitrator's disqualification." Pet. 13. The petition thus proceeds entirely on the premise that a failure of "disclosure" (Pet. 9) constitutes a substantive violation of

§ 10(a)(2)'s "evident partiality" standard.[6] There is no basis in the text of the FAA, this Court's decisions, or the decisions of any other court for that extraordinary proposition.

A. The Seventh Circuit's Decision Is Consistent With § 10(a)(2)

By its plain terms, § 10(a)(2) authorizes a district court to vacate an arbitration award upon a showing of "evident partiality . . . in the arbitrators, or either of them." Petitioner purports to derive two principles from that text: (1) that the "evident partiality" of both party-appointed and neutral arbitrators must be assessed in precisely the same way, Pet. 10; and (2) that, even absent a showing of "evident partiality," a party-appointed arbitrator's incomplete disclosure requires a district court to vacate the arbitration award. The text of § 10(a)(2), however, cannot bear the heavy weight imposed by petitioner.

1. Petitioner acknowledges that § 10(a)(2) makes no facial distinction between neutral and party-appointed arbitrators, but it draws precisely the wrong conclusion from that textual silence. Rather than mandate vacatur of the award, § 10(a)(2)'s silence on any distinctions to be drawn between neutral and party-appointed arbitrators must be construed in light of the agreement reached by the parties to arbitrate their dispute. As this Court has explained, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*,

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[6] Petitioner's brief to the court of appeals likewise claimed: "The question here is *not* whether Mr. Jacks's prior attorney-client relationship with Sphere Drake would have, if disclosed, provided All American with a valid basis to disqualify him from serving (as presumed by Sphere Drake); rather, the question is whether Mr. Jacks's failure to provide full and candid disclosure in order to conceal his prior attorney-client relationship from All American and the other arbitrators constitutes evident partiality requiring vacatur of the award pursuant to § 10(a)(2) of the FAA." All American 7th Cir. Br. at 14, No. 02-2458.

514 U.S. 52, 57 (1995). "Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (holding that parties could agree to incorporate state procedural law that the FAA might otherwise preempt).

Accordingly, § 10(a)(2) must be interpreted and applied in light of the parties' specific arbitration agreement. When All American launched the arbitration that gave rise to this litigation, it announced the appointment of a party arbitrator and invited Sphere Drake to name its own party arbitrator in its response to the demand for arbitration. *See* All American 7th Cir. Br. at 6 ("In its notice demanding arbitration, All American designated Robert Mangino as its party-appointed arbitrator and requested that Sphere Drake appoint an arbitrator."). That arbitration demand did not invoke any particular procedural rules, but rather proceeded on an *ad hoc* basis.

All American clearly understood that its arbitration agreement with Sphere Drake provided for party-appointed arbitrators who would *not* be "neutral" (and therefore "impartial") in the same way that the umpire is neutral, for its petition for a writ of certiorari (like its briefs below) repeatedly draws a distinction between "neutral arbitrators and party-appointed arbitrators." Pet. 11; *see also, e.g.*, Pet. i-ii, 3, 9-10, 16-17. Indeed, petitioner relies heavily on precedent specifically "recognizing that party selected arbitrators are not expected to be 'neutral.'" Pet. 15 (citing *Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 890-93 (D. Conn. 1991)).

All American's advocacy of a standard that each party-appointed arbitrator be as neutral and impartial as the umpire is thus fatally undermined by the very arbitration agreement that it concededly entered with Sphere Drake. As Judge Learned Hand explained long ago:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944). *See also Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88, 93 (R.I. 1993) ("[T]he parties would not consider the appointment of an arbitrator a valued right to be bargained for and litigated over if they contemplated no more than the appointment of a neutral arbitrator."); *Astoria Med. Group v. Health Ins. Plan of Greater New York*, 227 N.Y.S.2d 401, 405 (N.Y. 1962) ("The right to appoint one's own arbitrator, which is of the essence of tripartite arbitration . . . , would be of little moment were it to comprehend solely the choice of a 'neutral.' It becomes a valued right . . . only if it involves a choice of one believed to be sympathetic to his position or favorably disposed to him.").

Buttressing this conclusion is the fact that the agreement here allowed *ex parte* contacts between the parties and their respective arbitrators through the end of discovery, which further belies any suggestion that the party-appointed arbitrators were expected to act as neutrals. *See Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 18 (D. Mass. 2002) (permitting *ex parte* contacts makes it "evident that the parties never intended [party-appointed arbitrators] to be neutral to the same extent as the Umpire"). Moreover, the parties evinced an understanding that even the *umpire* need not meet the impartiality standards for federal judges, for they allowed him to serve despite his disclosure that he owned stock in a company that recently had made a bid to acquire All American. *See* Pet. App. 6a ("A judge can't hold even a

single share of a party's stock, but this would not imply 'evident partiality' for purposes of § 10(a)(2)."). "Parties are free to choose for themselves to what lengths they will go in quest of impartiality. Section 10(a)(2) just states the presumptive rule, subject to variation by mutual consent." *Id.* at 4a. *See also Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring) (noting that parties may agree to waive circumstances that would be grounds for vacatur under the evident partiality standard).[7]

2. Even if § 10(a)(2) somehow could be construed to require the same standard for "evident partiality" to be applied to neutral umpires and party-appointed arbitrators, petitioner has no textual basis for its assertion that § 10(a)(2) requires a court to vacate an arbitration award for an arbitrator's failure to make a disclosure to the parties where the requisite "evident partiality" is not otherwise satisfied. As one court has explained, § 10(a)(2)

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[7] Congress designed the Act "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). "Thus, as with any other contract, the parties' intentions control." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The FAA's "primary substantive provision," 9 U.S.C. § 2, states that arbitration agreements "'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991). Section 4 requires that the "arbitration proceed in the manner provided for in [the parties'] agreement." 9 U.S. C. § 4. And § 5 specifically requires that the method for selecting arbitrators contained in the parties' agreement "shall be followed." *Id.* § 5. *See, e.g., Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 225 (4th Cir. 1994) ("parties may determine by contract the method under which arbitrators for their disputes will be appointed") (citing cases); *ATSA of California, Inc. v. Continental Ins. Co.*, 754 F.2d 1394, 1395 (9th Cir. 1985) ("Under 9 U.S.C. § 5, the parties' method of appointing arbitrators must be followed. Generally, partisan arbitrators are permissible."). The legislative history to the FAA is just as plain as the statute: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. Rep. No. 68-96, at 1 (1924).

"makes no mention of an arbitrator's failure to disclose information as a basis for vacating an arbitration award." *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 497 (4th Cir. 1999).

Petitioner seeks (at 16) to capitalize on the court of appeals' statement that, after the cessation of permissible *ex parte* contacts, the party-arbitrators "are supposed thereafter to be impartial adjudicators" pursuant to ARIAS-U.S. rules. Pet. App. 5a. Even assuming that the parties had agreed to arbitrate by ARIAS-U.S. rules (which they did not[8]), all that the court of appeals could possibly have meant by this statement was that party-appointed arbitrators have a duty to hear the evidence fairly, even though they may be predisposed to their party's position.[9] But the court clearly did not mean that Arbitrator Jacks was expected to behave as a neutral, and petitioner

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[8] Petitioner's carefully worded statement (at 16) that "the Seventh Circuit found the parties' arbitration had been conducted" "under [the] auspices" of the AIDA Reinsurance and Insurance Arbitration Society ("ARIAS-U.S.") is misleading because it attempts to capitalize on a mistake in the court of appeals' recitation of the facts of this case. All American has never claimed that the parties agreed to arbitrate pursuant to ARIAS-U.S. rules (its factual statement here is likewise devoid of any such claim), and nothing in the record supports that suggestion. Indeed, All American's only reference to the ARIAS-U.S. rules below was to support its arguments that Jacks, as a founding member of ARIAS-U.S., was aware of the importance of disclosure. *See* All American 7th Cir. Br. at 26. *See also* Pet. 6 n.8. As All American recognizes, the district court noted the same fact, but it did not hold or even suggest that the parties agreed to be bound by ARIAS-U.S. rules. *See* Pet. 16 n.4 (citing Pet. App. 15a). Moreover, in its court of appeals brief, All American claimed only that the reinsurance "slips" evidencing the alleged contracts provided, in full: "Arbitration Clause" or "Arbitration Clause – Law and Jurisdiction Illinois, USA." All American 7th Cir. Br. at 6 n.8. All American never argued that this language required arbitration under ARIAS-U.S. (or any other organization's) rules.

[9] Canon II of the ARIAS-U.S. Code of Conduct provides that "[a]rbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision." ARIAS-U.S. Code of Conduct, Canon II, *available at* http://www.arias-us.org/code_canon02.shtml.

identifies nothing in the record to suggest as much. *See id.* at 3a ("in the main party-appointed arbitrators are *supposed* to be advocates"). Indeed, even the district court – which vacated the award – clearly understood that "Jacks was a party-appointed, as opposed to a neutral, arbitrator." *Id.* at 26a n.8; *id.* (distinguishing "cases concern[ing] alleged partiality on the part of the neutral arbitrator, or concern[ing] alleged partiality of panels composed entirely of purportedly neutral arbitrators"). All American could have insisted that the arbitrators all be neutral, but it did not.

B. The Decision Below Properly Interpreted *Commonwealth Coatings*

Petitioner's contention that the Seventh Circuit's judgment conflicts with this Court's decision in *Commonwealth Coatings* has no merit. Indeed, the decision below is perfectly consistent with this Court's decisions.

1. In *Commonwealth Coatings*, this Court vacated an arbitration award where the undisclosed information by the neutral arbitrator showed his evident partiality. There, the "neutral in a tripartite arbitration was engaged in *ongoing* business relations with one of the parties, 'and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit.' " Pet. App. 10a (quoting *Commonwealth Coatings*, 393 U.S. at 146 (plurality opinion)).

Justice Black's plurality opinion relied on *Tumey v. Ohio*, 273 U.S. 510 (1927), which had reversed a conviction, pursuant to the Due Process Clause, based on the judge's disqualifying pecuniary interest in the specific case before him. *Commonwealth Coatings*, 393 U.S. at 148. Justice White's concurring opinion likewise focused on whether an arbitrator would be "disqualified by a business relationship with the parties." *Id.* at 150. This Court has subsequently characterized *Commonwealth Coatings* (along with *Tumey*) as a case "in which the

adjudicator has a pecuniary interest in the outcome." *Withrow v. Larkin*, 421 U.S. 35, 47 & n.14 (1975).[10]

Petitioner concedes that Arbitrator Jacks did not meet that standard of ongoing pecuniary interest. *See* Pet. 13 (framing the issue as when "the facts to be disclosed would not result in the arbitrator's disqualification"). Nor could All American reasonably argue otherwise. Jacks had no pecuniary interest in Sphere Drake, he had ceased practicing law with Mayer, Brown & Platt four years prior to becoming an arbitrator in this matter, his representtations of a Sphere Drake subsidiary during the years when he was engaged in the practice of law were insufficient to warrant disqualification, and the ownership and management of the Sphere Drake entities that he had represented had turned over completely since his representations.

2. Petitioner unpersuasively attempts to morph *Commonwealth Coatings* into a decision requiring vacatur of an arbitration award when an arbitrator simply fails to disclose information, even when that information concededly would not demonstrate evident partiality. *See* Pet. 12 n.3 (contending that *Commonwealth Coatings* adopted a "*per se* prophylactic disclosure rule"). The court below

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[10] Although the plurality in *Commonwealth Coatings* used broad language in deeming even " 'the slightest pecuniary interest' on the part of the judge" to require vacatur of the arbitration award before it, 393 U.S. at 148 (quoting *Tumey*, 273 U.S. at 524), the Court later held that this passage was both "dicta" and "a misreading of *Tumey*." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 n.3 (1986). Instead, the Court explained that *Tumey* should be read to require vacatur only when the judge's interest in the case before the court is " 'direct, personal, substantial, and pecuniary.' " *Id.* at 825-26 (quoting *Tumey*, 273 U.S. at 523) (internal brackets omitted). Given this Court's subsequent reading of that passage in *Commonwealth Coatings*, there is no merit to petitioner's suggestion that *Commonwealth Coatings* established an independent disclosure standard divorced from the crucial issue of whether disqualification would have been required because of the "evident partiality" of the arbitrator. *Cf. Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Breath spent repeating dicta does not infuse it with life.").

properly rejected that characterization of *Commonwealth Coatings*. *See* Pet. App. 10a.

Although Justice White's concurring opinion encouraged an "atmosphere of frankness at the outset," *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring), that exhortation was aimed at encouraging "voluntary compliance with the decree, without need for judicial enforcement," so that the parties might waive an "evident partiality" challenge even where the disclosed facts might require disqualification on that basis. *Id.* (Noting that the parties themselves are the best "judge[s] of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.").

As the decision below recognizes, the "point of *Commonwealth Coatings* is that the sort of financial entanglements that would disqualify a judge will cause problems for a neutral under § 10(a)(2) unless disclosure is made and the parties' consent obtained." Pet. App. 10a ("being on one side's payroll is a form of partiality condemned by § 10(a)(2)"). All American itself concedes that the undisclosed information about Jacks' prior representation of Sphere Drake and its subsidiary would not have, if disclosed, demonstrated evident partiality or required disqualification. Pet. 13. Under a proper reading of *Commonwealth Coatings*, "[t]he material and relevant facts an arbitrator fails to disclose may demonstrate his 'evident partiality' under 9 U.S.C. § 10(a)(2). However, nondisclosure, even of such facts, has no independent legal significance and does not in itself constitute grounds for vacating an award." *ANR Coal*, 173 F.3d at 499.[11]

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[11] Petitioner claims to find a "circuit split" on a question – whether the plurality opinion or concurring opinion in *Commonwealth Coatings* is more authoritative – that is not relevant to the issue presented in the petition. Pet. 8 n.2. Indeed, petitioner does not ask the Court to grant review to resolve that supposed "split" or otherwise assert that this Court's clarification of the distinctions between those opinions in

C. The Circuits Are Not In Conflict On This Issue

Petitioner does not claim that the decision below conflicts with that of any other court of appeals, and it does not dispute the court of appeals' observation about the unprecedented nature of the district court's decision – "the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed 'evident partiality.'" Pet. App. 3a. Instead, petitioner asserts conflicts with only one federal district court decision and two state court decisions purportedly "applying the disclosure requirement of *Commonwealth Coatings* to all arbitrators – including party-appointed arbitrators." Pet. 14. Even those cases, however, are inapposite.

1. In *Metropolitan Property*, the district court found "overt misconduct" due to a party-appointed arbitrator's undisclosed *ex parte* contacts. 780 F. Supp. at 893. But it is undisputed in this case that All American and Sphere Drake specifically agreed to permit such contacts. *See* p.5, *supra*. Moreover, the district court in *Metropolitan Property* did *not* base its holding solely on the lack of disclosure, but rather on a substantive breach of the parties' agreement to arbitrate. 780 F. Supp. at 893 ("that

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Commonwealth Coatings would benefit All American in any way. As we explain in the text above, petitioner's position finds no support in either the plurality or the concurrence in *Commonwealth Coatings*, and the decision below was correct no matter which opinion is deemed controlling. In any event, the holdings of the other court of appeals cases cited by petitioner (*id.*) are inapposite to the issue petitioner has presented to this Court. *See, e.g., University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1342-43 (11th Cir. 2002) (remanding for fact-findings on possible evident partiality where district court had engaged in no fact-finding); *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) (holding that National Association of Securities Dealers Code required arbitrator in securities case "to make a reasonable effort to inform himself of his firm's representation of" parent company); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) (reversing district court judgment vacating arbitration award absent "evidence of actual or probable partiality or corruption").

agreement contains no provisions whatsoever that could be construed as even remotely sanctioning the type of *ex parte* activity alleged here"); *cf. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993) (finding *ex parte* contacts between a party and its appointed arbitrator "not only unobjectionable, but commonplace").[12]

In *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 220 (N.J. 1981) – which involved only state law and not the FAA – the arbitrator was owed substantial sums of money from ongoing business dealings with the party that appointed him.[13] That was precisely the type of financial interest absent in this case. In the other state court case (a two-page decision), the arbitrator was an officer or director of two corporations that had performed substantial work in the two previous years for the party appointing him. *Northwest Mech., Inc. v. Public Utils. Comm'n*, 283 N.W.2d 522, 523 (Minn. 1979).[14] Thus, those cases involved direct and continuing financial interests of a type that is absent here.

By contrast, petitioner has "failed to cite a single [court of appeals] case holding that a failure to disclose . . . constitutes an independent basis for vacatur absent proof that, in addition, the nondisclosure proves one of the statutory grounds for vacatur." *ANR Coal*, 173 F.3d at 499-500.

2. Moreover, the decisions of the courts of appeals uniformly confirm the common expectation that "party-

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[12] In any case, an asserted conflict between decisions of a court of appeals and a district court is no reason to grant certiorari. *See* Robert L. Stern *et al.*, *Supreme Court Practice* § 4.8, at 237-40 (8th ed. 2002).

[13] The court inexplicably "reject[ed] the notion . . . that the parties' contract should prevail" with regard to the duties of party-appointed arbitrators. 430 A.2d at 219 (4-3 decision).

[14] *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984), cited by petitioner (at 14), is also inapposite, as that case was decided on statute of limitations grounds, not "evident partiality."

designated arbitrators are not neutral, each being biased in favor of the party that designated him." *United Transp. Union v. Gateway W. Ry.*, 284 F.3d 710, 714 (7th Cir. 2002); *see also id.* at 711 ("since the party members of the panel are expected to vote in accordance with their principals' wishes (though they don't always do so), it is the neutral who is the real 'judge' and usually decides the case"); *Sunkist*, 10 F.3d at 760 ("a party-appointed arbitrator is permitted, and should be expected, to be predisposed toward the nominating party's case"). *Cf. Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001) (holding that arbitration agreement providing for tripartite panel "expressly contemplated the selection of partial arbitrators"), *cert. denied*, 123 S. Ct. 87 (2002).[15] To be sure, a party-appointed arbitrator should act fairly and in good faith. "[O]utright chicanery" is not sanctioned, *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring), only the customary predisposition that the parties have bargained for in agreeing to tripartite arbitration.

The courts of appeals have likewise consistently applied an "onerous standard for vacatur" that All American could not possibly meet: "[t]he alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (internal quotation marks omitted).[16] Because arbitration "is customized, not

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[15] Earlier this Term, this Court denied a petition for a writ of certiorari in *Delta Mine*, which also presented the question, as framed by All American here, whether a party-appointed arbitrator has the same disclosure obligations as a neutral under *Commonwealth Coatings*. *Cf. South Park Ind. Sch. Dist. v. United States*, 453 U.S. 1301, 1303-04 (1981) (Powell, Circuit Justice) (denying stay where "[t]he issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari").

[16] *See also Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (same); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992) (same); *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756

off-the-rack, dispute resolution," *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 651 (7th Cir. 2002), petitioner cannot demonstrate that, in the particular circumstances presented here, any other court would have applied § 10(a)(2) to vacate the arbitration award in favor of Sphere Drake. Absent such a showing of clear conflict among the courts of appeals, further review by this Court is unwarranted.

D. Petitioner's Selectively Invoked Arbitration Rules And Policy Arguments Are Misplaced And Without Merit

1. Petitioner invokes certain arbitration rules, but nowhere demonstrates that such rules were part of the parties' agreement to arbitrate. First, petitioner recites (at 16) the preamble to the ARIAS-U.S Code of Conduct for the proposition that party-appointed arbitrators should adhere to the same disclosure standards as the neutral.[17] But even if that language had been incorporated into the parties' agreement to arbitrate – and it was not – the antecedent paragraph explicitly provides that "[n]othing in these Guidelines is intended to or should be deemed to establish new or additional grounds for judicial review of arbitration appointments or arbitration awards nor establish any substantive legal duty on the part of arbitrators." ARIAS-U.S. Code of Conduct, Introduction, *available at* http://www.arias-us.org/code_intro.shtml. There would

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F.2d 742, 745-46 (9th Cir. 1985) ("The party alleging evident partiality must establish specific facts which indicate improper motives on the part of the Board. The appearance of impropriety, standing alone, is insufficient."); *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981) (holding "appearance of partiality" insufficient); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir. 1978) ("[W]e have not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information.").

[17] As explained in note 8, *supra*, the court below mistakenly suggested that ARIAS-U.S. rules governed the arbitration at issue in this case. Petitioner does not seriously contend here that those rules applied.

thus be no basis for a court to vacate the arbitration award based on any putative violation of an ARIAS-U.S. disclosure standard. Petitioner also relies (at 17) on Canon IV of the ARIAS-U.S. Code of Conduct, without demonstrating that the exclusive withdrawal standards specifically provided there have been satisfied in this case.[18]

Second, petitioner relies (at 17-18) on a proposed – and thus unenacted – revision to the American Bar Association's ("ABA") Code of Ethics for Arbitrators. Since its adoption in 1977, that Code has provided that non-neutral arbitrators "need not include as detailed information as is expected from persons appointed as neutral arbitrators." ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII(B)(1), *available at* http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html. Moreover, the proposed disclosure revision championed by petitioner would retain the current provision that "[n]on-neutral arbitrators are not obliged to withdraw if requested to do so by the party who did not appoint them." *Id.*, Canon VII(B)(2); *see* Code of Ethics for Arbitrators in Commercial Disputes (Proposed Revision 2000), 671 PLI/Lit 1039, *1055-*1056 (proposed Canon IX(C)). Other commonly used arbitration rules likewise offer no support for petitioner's general position.[19]

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[18] Comment 2 to Canon IV requires withdrawal only when (1) "all parties" request withdrawal; (2) the arbitrator determines that he or she should withdraw; (3) "procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal"; or (4) "required by the contract or law." *See* http://www.arias-us.org/code_canon04.shtml. The first two reasons are obviously inapplicable because neither all parties nor Jacks himself determined that withdrawal was appropriate, and petitioner cannot point to any procedures established by the parties or to a contract provision or law that might invoke the latter two grounds.

[19] The Commercial Arbitration Rules of the American Arbitration Association ("AAA") provide that, "[u]nless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed

Finally, even if any of the foregoing rules could somehow be imputed to the parties' agreement to arbitrate, such arbitration rules and ethical guidelines "do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10." *ANR Coal*, 173 F.3d at 499; *see also id.* at 500 ("[M]ere nondisclosure does not in itself justify vacatur."); *Merit*, 714 F.2d at 680 ("[E]ven if the failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially."). Thus, the court below was fully correct in reversing the district court's judgment vacating the arbitration award because Arbitrator Jacks' evident partiality cannot be established.

2. Petitioner claims (at 19-25) that good policy requires the Court to establish a disclosure requirement independent of – and far more demanding than – § 10(a)(2)'s "evident partiality" standard. In making that argument, petitioner repeatedly takes liberties with the record in claiming that Jacks' nondisclosure was "intentionally . . . misleading," "intentionally deceptive," or "intentionally . . . false and misleading." Pet. 23-25. The only support in the record for those over-blown characterizations was the overturned district court's description of Jacks' "inadequate disclosure" as "'negligent or even intentional.'" Pet. 6 (quoting Pet. App. 30a). In making that statement, however, the district court did not make a formal finding

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arbitrator and is not subject to disqualification pursuant to [Rule] 19." AAA Commercial Arbitration Rule 12(b), *available at* http://www.adr.org (Rules, Commercial Dispute Resolution Procedures); *see also id.*, Rule 19 (providing for disqualification only of neutral arbitrator); *cf. Delta Mine*, 280 F.3d at 822 n.4 (Rule 12 "provide[s] that, absent an agreement to the contrary, party-appointed arbitrators are presumed to be non-neutral."); ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII ("In [tripartite] arbitrations, the two party-appointed arbitrators should be considered nonneutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral.").

that Jacks' nondisclosure actually *was* intentional. In fact, no hearing was held at which Jacks' intent could have been determined. In view of the court of appeals' conclusion – uncontested here – that Jacks' nondisclosure would not have disqualified him as a federal judge sitting in this case, it is hard to see how even such an allegedly "intentional" omission could be deemed material in context.

Petitioner instead asserts that a party arbitrator's disclosure obligations should go "beyond that required by a judge presiding over a lawsuit." Pet. 13. Elsewhere, however, petitioner candidly "acknowledge[s] that arbitrators cannot, and should not, be expected to be as impartial as judges." Pet. 23. But, if arbitrators (even neutrals) are not expected to be as impartial as judges, then it makes no sense for a court to impose a greater obligation of disclosure on arbitrators. Petitioner defends its extravagant theory on the ground that "[c]ommon sense suggests that an umpire would want to know that a party arbitrator had a sustained and significant attorney-client relationship with the appointing party in assessing his position and potential bias during deliberations." Pet. 13. Of course, federal judges – whom petitioner concedes are expected to be more impartial than arbitrators – regularly sit on multi-judge panels, yet petitioner fails to explain why they might be less concerned about their colleagues' past activities than an arbitrator.

In any case, the court of appeals correctly held that "we have not been given any reason to think that [U]mpire Huggins wanted more information from Jacks in order to know what to make of [his] arguments during the panel's deliberations." Pet. App. 11a. All American – whose burden it was to show evident partiality[20] – simply failed to

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[20] *See, e.g., Al-Harbi*, 85 F.3d at 683 ("We agree with the Fourth Circuit that 'the burden on a claimant for vacation of an arbitration award due to "evident partiality" is heavy, and the claimant must establish *specific facts* that indicate improper motives on the part of an

carry that burden. That fact-bound determination does not warrant this Court's review. Moreover, as a policy matter, "[t]he approach proposed by [petitioner] would permit a disgruntled party to seize upon an undisclosed relationship as a pretext for invalidating the award. Under such a rule, an arbitration award could be vacated due to an arbitrator's failure to disclose a trivial fact even though that fact, if known prior to the arbitration, would not have enabled the losing party to have the arbitrator removed for cause. Such a system would undermine the parties[] faith in commercial arbitration and make the task of finding qualified arbitrators exceedingly burdensome." *ANR Coal*, 173 F.3d at 500 (internal quotation marks and citations omitted).

II. THE DECISION BELOW IS AN ESPECIALLY POOR VEHICLE FOR DECIDING THE CIRCUMSTANCES IN WHICH ALLEGED ARBITRATOR BIAS REQUIRES VACATUR OF AN AWARD

Even if petitioner had presented an issue meriting review, this case would be a poor vehicle for deciding it. First, the issue presented arises in a highly unusual factual posture not likely to recur. In demanding arbitration, All American merely announced the appointment of its party arbitrator and then asked Sphere Drake to appoint its party arbitrator. *See* p.13, *supra*. Thus the arbitration demand did not invoke any particular procedural rules, but rather proceeded on an *ad hoc* basis. To resolve this case, therefore, the Court would have to discern the parties' intent in a highly unusual situation that is unlikely to be replicated.

Second, petitioner seeks immediate review of an interlocutory judgment that, by its own admission, could well become moot. This case is now on remand to the district court, where petitioner has renewed three arguments for

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arbitrator.' ") (quoting *Peoples Security Life Ins.*, 991 F.2d at 146); *Health Servs. Mgmt.*, 975 F.2d at 1258 n.3.

vacating the arbitration award that neither the district court nor the Seventh Circuit has yet addressed.

Shortly after the court below denied petitioner's rehearing en banc petition, petitioner asked the district court to stay all remand proceedings concerning the three "other independent grounds raised by All American in support of vacating the award," pending this Court's disposition of its petition for certiorari. All American Motion To Stay Pending Application for Certiorari at 1, Civil Action No. 01 C 5226 (N.D. Ill. filed Nov. 12, 2002).[21] Petitioner contended that a stay was warranted to avoid "prejudicing All American's rights to obtain Supreme Court review." *Id.* at 2. As petitioner noted, "[s]hould the [district court] again vacate the award (a decision which would be subject to review by the Seventh Circuit)," then Supreme Court review of the evident-partiality issue presented here "may be jeopardized on mootness grounds." *Id.*[22]

Given that the issue presented in its petition for a writ of certiorari may possibly become moot as a result of those remand proceedings presently pending and being briefed in the district court, petitioner presents no reason why this Court should depart from its normal practice of declining to review judgments on interlocutory matters. The interlocutory character of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Virginia*

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[21] In addition to the "evident partiality" question in its petition here, All American claimed before the district court "(2) that the hearing denied All American fundamental fairness; (3) that the panel members exceeded their authority; and (4) that the panel exhibited a manifest disregard of the law." Pet. App. 12a-13a.

[22] All American did not appeal the district court's denial of its stay motion and has stipulated to a schedule by which briefing on all remaining issues will be completed by March 28, 2003. *See* App., *infra*, 6a.

Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Granting review now will neither obviate a remand nor eliminate the prospect of future requests for this Court's review, either on the present issue or those to be decided on remand. *See Hamilton-Brown Shoe*, 240 U.S. at 258 ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); *cf. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Accordingly, All American can offer no compelling reason to grant its petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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& BOYD
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Chicago, Illinois 60602
(312) 444-9660

Counsel for Respondent

March 7, 2003

APPENDIX

APPENDIX A

$4 Million XS $1 Million

451 SCR

Registration No. AH 0095097 Page of

REINSURED: ALL AMERICAN LIFE INSURANCE COMPANY, CHICAGO ILLINOIS, (NAIC CODE 60097) AS UNDERWRITTEN FOR BY WEB MANAGEMENT LLC.

PERIOD: Losses occurring in respect of risks attaching during the 12 month period commencing 1st June 1997.

TYPE: EXCESS OF LOSS REINSURANCE.

CLASS: In respect of all business classified by the Reinsured as Personal Accident business including but not limited to Accidental Death and Dismemberment, Occupational Accident, Occupational Accident Carveout, Accidental Death Carveout and Catastrophe covers and/or as original.

TERRITORY: Losses wheresoever occurring.

LIMITS: US$4,000,000 any one occurrence.
EXCESS OF:
US$1,000,000 any one occurrence.

REINSTATEMENT: Four Reinstatements each at 100% Additional Premium..

PREMIUM: Minimum and Deposit Premium US$400,000.

Payable as follows:-

10% at 1st June 1997
20% at 1st August 1997
30% at 1st November 1997
40% at 1st February 1998

Adjustable annually at 3.75% of the applicable Net Premium Income accruing in respect of risks attaching during the period hereon.

First adjustment at 31st May 1998
Final adjustment at 31st May 2000

DEDUCTIONS: 15% brokerage
(plus 1% F.E.T. as applicable).

WARRANTY: Two Life Warranty.

EXCLUSIONS:
i) Employers Liability
ii) Professional Sports
iii) Medical Business
iv) London Market Excess of Loss Business howsoever written.
v) Aviation and Marine Bodily Injury
vi) Group Life
vii) Credit Cards
viii) Airport Ticket and Coupon Business

LOSS RESERVE: Funding of outstanding losses by Letter of Credit if required.

US
CLASSIFICATION: US Reinsurance Treaty.

2a

EIUA10324

BEST AVAILABLE COPY

GENERAL CONDITIONS:

War and Civil War Exclusion - NMA 464
Ultimate Net Loss Clause
Service of Suit Clause USA NMA 1998
E.C.O. Inclusion Clause
Errors and Omissions Clause
Insolvency Clause
Insolvency Fund Exclusion Clause
Arbitration Clause
Offset Clause
Access to Books and Records
Definition of occurrence - occurrence means any one accident or series of accidents arising out of one event.
Interlocking Clause.
Intermediary Clause - John B. Collins Associates Inc.
Several Liability Notice (Reinsurance) LSW 1001.

WORDING: To be agreed Leading Underwriter only.

INFORMATION:

1. Reinsured's applicable estimated net premium income for the purpose of this reinsurance: US$10,000,000 (in respect of risks attaching during the period 12 months commencing 1st June 1997).

2. Information titled 'WEB Management LLC' seen and noted by Reinsurers hereon.

3. Net lines protected hereunder

   US$ 1,000,000 any one person
   US$10,000,000 any one programme

4. Occupational Accident business is protected with a Per Risk Program excess of US$30,000 which inures to the benefit of this Reinsurance or so deemed.

3a

SCHEDULE B REGISTRATION NO. AU00990937

451
SCR

100%

100 %

John Hancock Mutual Life Ins Co
Per
JE+ Printed Name
P2114597

17.5% CHIYODA EUROPE

K 9 9 2 6 9 X 9 7		
C1401	LISBEA	NCAD

WHL. NKORLE 1/10/97.
Wtd. Prem Paid (Ccy) by 1/11/97
and received by 15/11/97.

15:11:97 O

10%
TO SIGN

ACCEPTED UNDER CONTRACT
No 50413
Per SPHERE DRAKE INS CO
970610NXX10A

Subject to written confirmation

EIUA16326

PAGE 4 of 4

4a

Confirmation of Acceptance under Horace Holman Contract No: 50413 underwritten by Sphere Drake Insurance Plc per Sphere Drake Underwriting Management Ltd.

Declaration No: 970610NXX10A

Insured/Reinsured: ALLAMERICAN LIFE / WOS MANAGEMENT

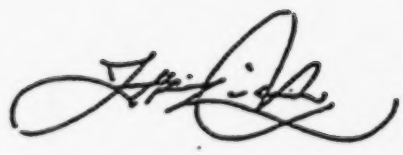
Inception Date: 1.6.97

Sum Insured/Original Limit: $ 4,000,000 x $ 1,000,000

Written Line 10% TO SIGN

Acceptance Date 3.10.97

Producing Broker SCB



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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 01C 5226

SPHERE DRAKE INSURANCE LIMITED,
Plaintiff,

v.

ALL AMERICAN LIFE INSURANCE COMPANY,
Defendant.

[January 28, 2003]

ORDER

It is hereby ordered that All American Life Insurance's ("All American") renewed motion to vacate the arbitration award shall be presented as follows:

1. All American shall have until February 19, 2003 to file its brief in support of its renewed motion to vacate the arbitration award;

2. Sphere Drake Insurance Limited shall have until March 12, 2003 to file its brief in opposition to All American's renewed motion to vacate the arbitration award;

3. All American shall have until March 28, 2003 to file its reply in further support of its renewed motion to vacate the arbitration award.

ENTERED:

/s/ REBECCA R. PALLMEYER
Judge Rebecca R. Pallmeyer